IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CASCADE AUTO GLASS, INC., Appellant, v. FARMERS INSURANCE GROUP OF COMPANIES, FARMERS INSURANCE COMPANY, INC., FARMERS INSURANCE COMPANY OF ARIZONA, FARMERS INSURANCE COMPANY OF IDAHO, FARMERS INSURANCE EXCHANGE, FARMERS INSURANCE COMPANY OF OREGON, FARMERS INSURANCE COMPANY OF WASHINGTON, MID-CENTURY INSURANCE COMPANY, MID-CENTURY INSURANCE COMPANY OF TEXAS, ILLINOIS FARMERS INSURANCE COMPANY, Respondents.	No. 32609-4-II UNPUBLISHED OPINION

QUINN-BRINTNALL, C.J. — Cascade Auto Glass, Inc. sued Farmers Insurance Group of Companies, Farmers Insurance Company of Arizona, Farmers Insurance Company of Idaho, Farmers Insurance Exchange, Farmers Insurance Company of Oregon, Farmers Insurance Company of Washington, Mid-Century Insurance Company, Mid-Century Insurance Company of Texas, and Illinois Farmers Insurance Company (collectively "Farmers"),[1] claiming that Farmers

[1] We use the term "Farmers" for writing ease to refer to an amalgam of various entities in many

failed to pay the full amount it owed for repairs which Cascade made to the windshields of Farmers' clients. In its complaint, Cascade claimed that (1) it repaired the windshields of people insured by Farmers; (2) in payment for the repairs, the insureds assigned their Farmers policy rights to Cascade; and (3) Farmers short-paid Cascade by failing to pay the full amount owed. The trial court entered summary judgment in Farmers' favor. Because genuine issues of material fact remain, we reverse the trial court's summary judgment and remand for trial.

FACTS

Cascade, an auto glass repair and replacement company, sued Farmers, claiming that Farmers refused to honor payment assignments numerous policyholders had made to Cascade for windshield replacement and repair costs. Cascade claimed that Farmers breached these assignments by refusing to pay the full amount of the repair service even though Cascade performed these repairs at a reasonable market price.

Cascade claimed that Farmers owed it $897,259.63 as of March 7, 2002.[2] Cascade incorporated into the complaint a 96-page exhibit summarizing the invoices not paid fully by Farmers. This summary purports to show approximately 5,360 instances of Farmers' alleged short-pays.

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different states. Farmers denies that these various entities did business as "Farmers Insurance Group of Companies." Resp't Clerk's Papers (CP) at 537. Farmers moved for summary judgment, arguing that the trial court did not have jurisdiction over all these entities and that the venue was inconvenient. The trial court denied this summary judgment motion on November 8, 2002. Farmers has not appealed the trial court's denial of this summary judgment motion.

[2] On September 1, 2004, Cascade moved to amend its complaint to include the amount Farmers owed as of July 9, 2004. Because the disputed short-pay payment calculations continued after the filing of the complaint, Cascade alleged that Farmers owed it $4,315,795.05. This is allegedly based on over 18,000 claims of short-pays existing as of July 9, 2004. From the record, it appears that the trial court entered summary judgment on the original complaint before it addressed Cascade's motion to amend.

Farmers served Cascade with requests for production and interrogatories asking for (1) all documents relating to Cascade's claims; (2) the alleged written assignments of benefits from Farmers' insureds; (3) any written or electronic communication with Farmers' insureds; and (4) invoices and documents for services rendered and not paid in full.

Citing CR 33(c),[3] Cascade replied that it would provide business records to answer the interrogatories. It also promised that it would "produce for inspection and copying all responsive, non-privileged documents within its possession, custody or control at a time and place to be agreed upon by counsel." 2 Clerk's Papers (CP) at 269.

Farmers' counsel went to Cascade's storage facility to inspect the documents.[4] There Cascade had approximately 50 boxes of documents relating to work it performed from 1999 to

[3] CR 33(c) states:

> Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

[4] All parties indicate that the initial inspection of the documents was preliminary in nature.

2003. Each invoice was approximately four to six pages in length. Cascade claimed that these boxes contained the information Farmers requested in the interrogatories described above.[5]

At Farmers' request, Cascade segregated five typical sample claims documents. These contained Cascade work orders, invoices directed to Farmers, and documents labeled "Glass Breakage Reports" which included a section titled "Assignment Of Proceeds And Authorization To Pay." 2 CP at 111.

The "assignment of proceeds" section on Cascade's glass breakage report read in part:

> I authorize my insurance company to release policy coverage and other information to [Cascade]. I hereby authorize and direct my insurance company to pay this invoice directly to Cascade . . . and I assign any and all claims in connection with this automobile glass installation or repair against my insurance company and all policy proceeds due for this installation or repair to Cascade. I agree that if my insurance company should ignore this directive to pay and the assignment of the policy proceeds and issue payments to me that I will immediately forward payment to Cascade.

Sealed CP at 474.

Farmers then made numerous requests for Cascade to segregate and identify documents specifically pertaining to each of the 5,360 claims in the complaint. Farmers stated that Cascade had the burden to furnish the supporting documents for each of Cascade's individual claims and that it was not its job to "find a needle in a haystack." 2 CP at 113. Farmers claimed it could not conduct discovery until Cascade segregated the documents because it was not practical to look through all the documents as they were kept.

Citing CR 34,[6] Cascade refused to segregate the documents on each claim and argued that

[5] Farmers' brief states that Cascade separated out 34,848 of Farmers' claims for inspection when only 5,360 claims of short-pay were then at issue. This forced Farmers to wade through over 200,000 pages to access what it needed. But this is not substantiated in the record. The record states that there were 50 boxes, but it does not state there were 34,848 claims.

[6] CR 34 states:

it complied with Farmers' discovery request by producing documents for inspection as they were kept in the ordinary course of business.

Farmers moved for summary judgment on each of the 5,360 claims for which Cascade had not segregated the evidence of the material facts disputed. Farmers asserted that, by refusing to segregate and produce documents supporting each claim, Cascade "failed to produce any

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(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of rule 26(b).

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after the summons and a copy of the complaint are served upon the defendant, or the complaint is filed, whichever shall first occur, and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 40 days after service of the summons and complaint upon that defendant. The parties may stipulate or the court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

evidence that the . . . policyholders actually assigned their claims to Cascade, had work done by Cascade, submitted claims to [Farmers], and were paid less than what they were entitled to." 2 CP at 107.

Farmers characterized Cascade's case as 5,360 individual claims. It argued that to defeat summary judgment, Cascade must produce evidence sufficient to show it has material facts in dispute for each claim in which it sought additional payment. According to Farmers, Cascade failed to produce any evidence supporting the claims other than the five segregated sample claims; and Cascade's invitation to review its stored records was an improper attempt to shift the burden of discovery onto Farmers.

In response to Farmers' summary judgment motion, Cascade submitted an affidavit from its Vice President, Bradley Nelson. That affidavit established that when Cascade performs glass services for Farmers' policyholders, it obtains an assignment of the proceeds Farmers owes its policyholders as payment for the repair work done and submits an invoice directly to Farmers along with a copy of the assignment document. Nelson stated further that:

> It is our company's policy and our custom and practice to obtain the assignment of insurance proceeds in every instance where we are doing work for a customer who has insurance to cover some or all of the cost of the repair or replacement of the damaged automobile glass. Examples of the actual assignments obtained from our customers were attached as [sealed exhibit in the record]. That same assignment language has been submitted to Farmers on literally thousands of claims each year. I am not aware of a single instance in which we have submitted an invoice to Farmers that did not contain the executed assignment. That is not to say that there are not individual instances where that has occurred. If it has, that would be contrary to our policy and practice.

3 CP at 407-08.

Nelson also prepared a 96-page summary as evidence of Farmers' short-pays to Cascade.

The summary was compiled from Cascade's business records database and included the invoice number, customer name, shop date, loss date, policy number, insurance company, total due, amount paid, and the amount remaining unpaid. Nelson's 96-page report was incorporated by reference in the complaint and summarized Cascade's business records that were stored in boxes in the company's Vancouver storage facility. These were the records that had been made available to Farmers. Nelson stated that the summary's supporting documents are so voluminous that in-court examination of the thousands of invoices, each containing more than one page per invoice, would be inconvenient.

The trial court agreed with Farmers' contention that each invoice represented a separate claim that must be pleaded and proved and granted Farmers' motion for summary judgment. It entered a written order granting summary judgment because Cascade "failed to make a sufficient showing by competent evidence of the existence of elements essential to prove the thousands of individual breach of contract claims." 3 CP at 491. Cascade appeals.

We address whether evidence of Cascade's routine business practice and its 96-page summary are sufficient to demonstrate disputed issues of material facts necessary to withstand Farmers' motion for summary judgment.

Analysis

Washington law favors resolution of cases on their merits. *See Smith v. Arnold*, 127 Wn. App. 98, 103, 110 P.3d 257 (2005). In reviewing the trial court's grant of summary judgment, we engage in the same inquiry as the trial court. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issue of material fact

and that the moving party is entitled to judgment as a matter of law. CR 56(c). The moving party has the burden to show that no genuine issue of material fact exists.[7] *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). It can meet this burden by showing that there is an absence of evidence from which the nonmoving party can make out its prima facie case. *Young*, 112 Wn.2d at 225. If the moving party is a defendant and meets this initial showing, then the burden shifts to the plaintiff to set forth specific facts sufficiently rebutting the moving party's contentions and disclosing the existence of material issues of disputed fact. *Young*, 112 Wn.2d at 225. The nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits considered at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Instead, a response by affidavits or as otherwise provided in CR 56, must set forth specific facts showing that there is a genuine issue for trial. CR 56. In order for a nonmoving party plaintiff to survive a summary judgment motion, the plaintiff must either show (1) the existence of a material question of fact for each essential element which it bears the burden of proof at trial, *Young*, 112 Wn.2d at 225, or (2) undisputed facts prove its claim, entitling it, not the moving party, to summary judgment. *Impecoven v. Dep't of Revenue*, 120 Wn.2d 357, 841 P.2d 752 (1992) (reversing summary judgment for moving party and entering summary judgment for nonmoving party); *see also Rubenser v. Felice*, 58 Wn.2d 862, 866, 365 P.2d 320 (1961).

We review a summary judgment weighing all facts and any reasonable inferences from those facts in the light most favorable to the nonmoving party. *See Van Dinter v. City of*

[7] A material fact is one that affects the outcome of litigation. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995).

Kennewick, 121 Wn.2d 38, 44, 846 P.2d 522 (1993). In this breach of contract case, the nonmoving party is Cascade.

Farmers does not contend that it is entitled to summary judgment on the five segregated claims. Rather, it argues that the documents in those five cases are insufficient to show the requisite elements for Cascade's cause of action for the other 5,355 claims.

For the sake of argument we assume that Farmers provided sufficient evidence to meet its initial burden. The parties do not dispute that Farmers had an underlying contractual insurer-insured relationship with each of the policyholders that Cascade claims assigned their rights to it under those contracts or that Cascade performed the glass repair work. Thus, the disputed issues are whether there is evidence sufficient to raise a question of material fact regarding whether (1) Cascade received valid assignments from Farmers' policyholders; and (2) Farmers breached the assigned contracts by short-paying Cascade.

We hold that Cascade established that material issues of disputed fact exist and remand for trial.

Assignment

An organization may proffer evidence of routine practice as proof that it performed a particular act on a particular occasion. ER 406. Under ER 406, "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."

"Routine practice" is not defined in the rules, but the following guidelines indicate a routine practice: (1) the conduct is of such a nature that it is unlikely that the individual instance

can be located; (2) the conduct should be specific conduct that is engaged in frequently by the group;[8] and (3) the conduct should be fairly easy to prove in the sense that the number of instances of such behavior must be large enough that doubt about a single instance does not destroy the inference that the practice existed. 5A Karl B. Tegland, Washington Practice: Evidence Law and Practice § 406.4, at 27 (4th ed. 1999) (citing Wright & Graham, Federal Practice and Procedure: Evidence § 5274).

For summary judgment purposes, the nonmoving party's affidavits establishing routine business practices can create a material question of fact sufficient to defeat summary judgment. *Rowley v. Am. Airlines*, 885 F. Supp. 1406 (1995). In *Rowley*, the plaintiff sued American Airlines for discrimination because American Airlines allegedly left her unattended and failed to return her mobility device to her at the front of the gate as soon as possible. 885 F. Supp. at 1408-09. In defense against the plaintiff's summary judgment motion, American Airlines offered employee affidavits stating its business practice was to (1) have an employee at the gate and (2) bring scooters to the gate and unload them first. *Rowley*, 885 F. Supp. at 1409. The court held that these affidavits presented sufficient admissible evidence under ER 406 to create a material question of fact as to whether American Airlines left the plaintiff alone for the alleged period of time and whether it failed to promptly retrieve her scooter. *Rowley*, 885 F. Supp. at 1412-14.

Here, Cascade presented Nelson's affidavit and his 96-page summary outlining the company's routine business practice of obtaining such assignments every time Cascade provides

[8] Organizational policy for dealing with contingencies that seldom arise is not enough.

services for an insured customer. Cascade's glass breakage documents include an invoice with an "Assigment of Proceeds and Authorization to Pay" clause. Sealed CP at 474. Particular language is not required to effect an assignment. *Amende v. Town of Morton*, 40 Wn.2d 104, 106, 241 P.2d 445 (1952). Cascade's assignment clause specifically states that the signors are assigning all of their rights to receive insurance proceeds flowing from the replacement or repair of glass services Cascade performed. This language creates a valid assignment because the subject matter is clearly identified, the assignors' intent is evidenced by the customers' signature, and control is relinquished to Cascade. *Amende*, 40 Wn.2d at 106-07; *Demopolis v. Galvin*, 57 Wn. App. 47, 53, 786 P.2d 804, *review denied*, 115 Wn.2d 1006 (1990).

Additionally, the 96-page summary which Cascade's vice president prepared demonstrates that Farmers paid a portion of the amount billed in each claim. This evidence tends to prove that Farmers honored the assignments, because, but for the assignment, Farmers would have sent payment for the glass repairs to the policyholder, not Cascade.

Weighing this evidence and the reasonable inferences from it in the light most favorable to Cascade, the glass breakage documents, Nelson's affidavit, and the 96-page summary are sufficient to raise a material question of disputed fact that Farmers' insureds assigned their right to payment for glass repairs to Cascade and that Farmers recognized the legitimacy of that assignment.

Short-Pay

Cascade's 96-page summary is also sufficient to raise a material issue of disputed fact as to Cascade's allegation that Farmers failed to pay the full amount owed for such repairs under that assignment.

ER 1006 permits summaries of evidence when "[t]he contents of voluminous writings . . . cannot conveniently be examined in court." Once the foundation has been laid, ER 1006 summaries are substantive evidence. *State v. Lord*, 117 Wn.2d 829, 856 n.5, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992). The proponent of the summary must show that: (1) the original materials are voluminous and an in-court examination would be inconvenient, ER 1006; *State v. Barnes*, 85 Wn. App. 638, 662, 932 P.2d 669 (1997), *review denied,* 133 Wn.2d 1021 (1997); (2) the originals are authentic and the summary accurate, 5C Karl B. Tegland, Washington Practice: Evidence Law and Practice § 1006.3, at 271 (4th ed. 1999); (3) the underlying materials would be admissible as evidence, 5C Tegland, supra § 1006.3, at 273 (citing *State v. Kane*, 23 Wn. App. 107, 594 P.2d 1257 (1979); *Pollock v. Pollock*, 7 Wn. App. 394, 499 P.2d 231 (1972)); and (4) the originals or duplicates have been made available for examination and copying by the other parties. ER 1006; *Barnes*, 85 Wn. App. at 662-63.

Below, Farmers argued that Cascade's summary did not qualify as an ER 1006 summary because it was inaccurate and that the documents were not made available for inspection. It also argued that the summary did not provide enough competent evidence to defeat summary judgment because it was essentially a restatement of the allegations made in the complaint. But on appeal, Farmers does not assert that the summaries are inaccurate, inadmissible, or non-voluminous. Moreover, the record shows that Nelson compiled the summary and that the documents (1) are business records kept in the ordinary course of Cascade's business; (2) were made available for Farmers' inspection; and (3) are so voluminous that it would be inconvenient to review them in open court.

It is clear from the record that the documents summarized are voluminous. Both parties

agree that the boxes of documents contain thousands of pages. Nelson's affidavit sufficiently establishes that the documents are business records on which the company regularly relies to conduct its business. Thus, there is some evidence of their reliability and admissibility. Finally, these documents can be authenticated by Cascade's documents custodian.

Viewing all the facts and all reasonable inferences in Cascade's favor, as we must, the evidence demonstrates material issues of disputed fact exist on each element and that summary judgment was improper. Cascade established that Farmers had a contract with each of the 5,360 policyholders; that those policyholders, as part of Cascade's routine business practice, assigned their rights to insurance proceeds to Cascade; and Cascade provided a summary of evidence suggesting that Farmers breached the assigned contracts when it paid part, but not all, of the billed amount.

Cascade produced sufficient admissible evidence to raise a material question of fact regarding each element Farmers disputed and, thus, is entitled to trial.[9]

Reverse and remand for trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, C.J.

We concur:

[9] We are not asked to and do not decide whether the evidence is sufficient as a matter of law to prove its claims and entitle Cascade to summary judgment.

No. 32609-4-II

BRIDGEWATER, J.

PENOYAR, J.